

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 137,117

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on December 12, 1995. The Appeals Board heard oral argument March 19, 1996.

APPEARANCES

Claimant appeared by his attorney George Richardson of Kansas City, Missouri. Respondent and its insurance company appeared by their attorney Gary R. Terrill of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Patrick J. Gregory of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted stipulations identified in the Award.

ISSUES

- (1) Nature and extent of disability.
- (2) Whether claimant is entitled to temporary total disability benefits.
- (3) Whether the independent medical examination report is admissible without the physician's deposition.
- (4) Whether claimant is entitled to authorized medical expenses when no statement was introduced into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

- (1) Claimant sustained an 8 percent permanent partial general disability as a result of an accident arising out of and in the course of his employment for respondent on December 24, 1987.

There is no real dispute that claimant suffered injury to his cervical spine on December 24, 1987 when the door of the pickup on which he was working fell as he was trying to remove it. Claimant also, however, was involved in two automobile accidents, one February 1988 and a second in July 1989, and two other incidents, one when he misjudged a step and experienced a quick jarring sensation and a second when walking his dog, all of which produced symptoms to his neck, the same area of his body injured in the work-related accident.

Respondent contends claimant has failed to prove the nature and extent of the disability from his work-related accident. Respondent asserts that some or all of claimant's impairment results from subsequent accidents and argues that claimant has failed to establish which portion of his impairment resulted from the on-the-job injury.

The record includes evaluations by three physicians. Dr. Don B. W. Miskew, the primary treating physician, testified that claimant suffered a 30 percent permanent partial impairment and attributes this impairment to the work-related injury. Dr. Miskew did not see the claimant until after the intervening automobile accident of February 11, 1988. He did, however, have the history of the job-related injury as well as the history and information from the automobile accident. It seems apparent that claimant suffered neck-related symptoms from an automobile accident in which he hit his head on the rearview mirror. Claimant has acknowledged that his symptoms increased at the time of his automobile accident but insists they returned to approximately the same as those he suffered from the on-the-job injury before the automobile accident.

Respondent referred claimant for evaluation to Dr. Mary E. Brothers. She found impairment but testified that she could not determine which portion, if any, should be attributable to the work injury and which attributable to the subsequent accident.

The Appeals Board finds, however, the testimony of Dr. David Tillema to be more persuasive. Dr. Tillema performed an independent medical examination in this case. He had available to him and reviewed records from Dr. Miskew as well as the records from Business and Industry Health Group where claimant was treated prior to his first

automobile accident. Dr. Tillema found claimant sustained an 8 percent permanent partial impairment attributable to the on-the-job injury. With regard to the February 1988 automobile accident Dr. Tillema's report states:

"There is a question of aggravation from his motor vehicle accident. I feel the entire rating can be attributed specifically to the work related injury of December, 1987. The motor vehicle accident in February, 1988 produced a temporary aggravation only."

Dr. Tillema's report does not mention the automobile accident in 1989, the jar while walking down stairs or the aggravation while walking the dog. Respondent insists the report and rating are therefore unreliable. However, claimant testified that he did advise Dr. Tillema of the 1989 automobile accident and recalled specifically advising him of the treatment following that accident. Probably more significantly, the claimant's testimony indicates that the automobile accident in 1989 did not have a significant effect upon his neck injury. The incident walking down the stairs and walking the dog also, from claimant's testimony, were temporary aggravations only. The Appeals Board has not adopted Dr. Miskew's rating because it appears he based his rating, in part, on his frustration with the insurance carrier's failure to follow his recommendations.

(2) The Appeals Board finds that claimant's temporary total disability benefits should be for 8.41 weeks only. The Administrative Law Judge awarded benefits for 10 weeks. The Appeals Board finds and concludes, however, that temporary total disability benefits should cease as of the date the claimant was released to return to work from his on-the-job injury, i.e., February 18, 1988. The best evidence in the record suggests that claimant was off work following his on-the-job injury and had been released to return February 18, 1988 but was prevented from doing so by the automobile accident. The period from the date of accident through February 18, 1988 is 8.14 weeks for which claimant would be entitled to total disability benefits at the rate of \$256.00 per week.

(3) The Appeals Board finds and concludes that the independent medical examination was conducted pursuant to an Order entered under K.S.A. 44-510e(a). That statute provides the evaluation rating from that independent medical examination shall be considered. The statute parallels K.S.A. 44-516 which permits the administrative law judge to order an examination by a neutral examiner. The change in K.S.A. 44-510e, requiring that report would be considered, is a procedural change, one that eliminates the requirements of K.S.A. 44-519 for a deposition to support admission of the opinions into evidence when the evaluation is done pursuant to K.S.A. 44-510e(a). Accordingly, the Appeals Board finds the report from the independent medical examiner is admissible.

(4) Claimant is entitled to unauthorized medical expense upon proper presentation of a statement for that expense. Respondent argues that unauthorized medical expense should not have been awarded in this case because no medical bill was introduced into evidence. Better practice would include introduction of the bill with time for the respondent to object or depose and question regarding that statement prior to the award. In this case no statement was introduced or offered. The claim is considered, however, a compensable claim and claimant would be entitled to any unauthorized medical expense incurred up to the maximum allowable time of the accident, i.e., \$350.00. The payment of unauthorized medical expenses is, therefore, not discretionary. Accordingly, the Appeals Board considers it appropriate to provide as a part of the award that the unauthorized

medical expenses be awarded subject to proper presentation of the statement to the respondent.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Administrative Law Judge Robert H. Foeschler should be, and the same is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerald J. Domann, and against the respondent, Shawnee Mission Ford, Inc., and its insurance carrier, Universal Underwriters Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred December 24, 1987 and based upon an average weekly wage of \$734.60, for 8.14 weeks of temporary total disability compensation at the rate of \$256.00 per week or \$2,083.84 followed by 406.86 weeks at the rate of \$39.18 per week or \$15,940.77 for an 8 percent permanent partial general body impairment of function, making a total award of \$18,024.61 all of which is due and owing in a lump sum less any amounts previously paid.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 is also awarded to the claimant subject to proper presentation of and statement to respondent for such expense.

The Kansas Workers Compensation Fund is ordered to reimburse the respondent and its carrier \$3,000.00 as stipulated.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

Metropolitan Court Reporters, Inc.	\$ 260.00
Hostetler & Associates, Inc.	\$1,103.75

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George Richardson, Kansas City, MO
Gary R. Terrill, Overland Park, KS
Patrick J. Gregory, Overland Park, KS

Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director